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Utah Supreme Court

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No. 6320

In
The Supreme Court
of the
State of Utah

JOHN CHRISTY and KATHRYN
E. CHRISTY, Husband and Wife,
Plaintiffs and Respondents,
vs.

EDWARD L. GUILD and MABEL
C. GUILD, Husband and Wife,
Defendants and Appellants

Appeal From Third District Court, Salt Lake County
Hon. Oscar W. McConkie, Judge

RESPONDENTS' BRIEF

H. G. METOS,
H. L. MULLINER,
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and Respondents.

FILED

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E. CHRISTY, Husband and Wife,
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EDWARD L. GUILD and MABEL
C. GUILD, Husband and Wife,
Defendants and Appellants

RESPONDENTS' BRIEF
STATEMENT

This case was originally instituted in the City Court of Salt Lake City as, and we have assumed that it remains, an action in unlawful detainer, seeking restitution of the premises described in the complaint and damages for unlawful detention thereof. From a judgment in favor of the plaintiffs, the defendants appealed to the District Court and demanded a trial by jury.

There is no dispute in the evidence as to the delinquencies of the defendants. It appears from the evidence that on January 24, 1935, a sales agreement of the premises was entered into between the parties. The defendants made a down payment of \$20.00 and agreed to pay the balance of \$3,180.00 in monthly installments. In said contract

defendants agreed, in addition to paying the monthly installments, to erect certain improvements and to pay taxes and fire insurance premiums.

On January 16, 1940, the plaintiffs served notice on the defendants, intending to forfeit the contract, and, at that time, the defendants made a payment and promised to keep up the payments and that they would bring the contract up to date as soon as the defendant, Edward L. Guild, got a settlement from the Industrial Commission. (Tr. 122-3). The defendants, on March 27, 1940, made an assignment of their contract to their son and daughter. (Tr. 126-7).

The defendants having failed to live up to their promises, the plaintiffs, on April 30, 1940, served notice on the defendants forfeiting the contract for failure to place upon the front of said premises a porch with a concrete foundation and fire brick upon the full length of the building located on the premises, and for failure to remodel and plaster with California stucco the rear of said building, for failure to pay the monthly installments due on the 1st days of January, February, March and April, 1940, in the sum of \$30.00 per month, and a balance of \$10.00 for the installment due the 1st day of December, 1939, aggregating the total sum of \$130.00, and for failure to pay taxes for the years 1935, 1936, and 1938, totalling the sum of \$293.70, plus interest, and insurance in the sum of \$13.50.

The testimony is without dispute as to the foregoing defaults on the part of the defendants.

The defendants attempted, and now attempt, to overcome these defaults by making the following defenses and contentions:

1. That the plaintiffs had orally agreed to modify the contract with the defendants,

because the permanent improvements aforesaid were considered by the parties as undesirable.

2. That the defendants had made payment of the delinquent taxes and insurance, by virtue of defendants' note, Exhibit No. 2.

3. That the defendants were entitled to equitable consideration because they had placed valuable improvements upon the premises, and that they had an equity in the premises because they had made payments over a period of time.

The foregoing propositions and their merits will be discussed under the headings above given.

ARGUMENT

The Modification of a Written Contract Relating to Real Estate Must Be in Writing and Supported By a Consideration

The defendants, in their brief, assigned as error the granting by the trial court of plaintiffs' motion to strike the oral testimony given by the defendants to the effect that they had talked to the plaintiffs about the improvements to be erected upon the front and rear of the building located on said premises and that plaintiffs agreed with defendants that it would not be necessary for them to make such improvements called for in the contract.

Under the law, a provision to forego the right to demand performance of a contract would be nudum pactum and void in the absence of any consideration. A consideration is always necessary. Where a contract affecting real estate is in writing, any

modification of such contract must be in writing and supported by a consideration.

The defendants failed to show a consideration for the modification of such contract and that such modification was in writing. In

66 C. J., p. 728, it is stated:

“In accordance with the general rules governing modification of contracts, in order to render valid an agreement modifying a contract for sale of land, or substituting an entirely new contract in its place, there must be good and sufficient consideration and the contract must not be lacking in mutuality.”

In the same volume, at page 727, it is also stated:

“ . . . Because of particular statutory provisions (referring to the statute of frauds), a written contract of sale of lands cannot be subsequently modified by parol agreement . . . ”

See also

80 A. L. R. 540.

29 A. L. R. 1095.

17 A. L. R. 14,

holding that a contract required by a statute of frauds to be in writing cannot be subsequently modified by oral agreement. In the case of

Combined Metals v. Bastian, 71 Utah 535;
267 P. 1020, the Court stated:

“When the testimony of such additional oral agreement was offered, Bastian’s objections thereto were overruled. We think the court erred in the ruling. The doctrine is familiar that when parties put their negotiations into writing, in such terms as im-

port a legal obligation, and on its face a completed contract, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole of the engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and that parol evidence is not admissible to vary or contradict the terms of such writing or add or substitute new or different or additional terms. *McCornick v. Levy*, 37 Utah 134, 196 P. 669; *Vance v. Heath*, 42 Utah 148; 129 P. 365; *Midgley v. Campbell Bldg. Co.*, 38 Utah 293, 112 P. 820; 2 Williston on Contracts, Sec. 633; 10 R. C. L. 1018; 13 C. J. 771."

"Again, the original contract to be binding and enforceable, and to satisfy the statute of frauds, was required to be, as it was, in writing and subscribed by the parties sought to be charged. To alter or modify any of its material parts or terms by a subsequent agreement required one also to be in writing and so subscribed, especially the alleged agreement whereby Bastian, if successful in his litigation with Woolley, was to convey to plaintiffs an interest in and to the ranch in lieu of the bank stock and of the sugar company note. *Lincoln Realty Co. v. Garden City*, 94 Neb. 346, 143 N. W. 230, Ann. Cass. 1914D, 342; *Price v. McDowell*, 52 Okl. 608, 153 P. 649; Notes L. R. A. 1917B, 141. Neither part performance nor anything done by plaintiffs in reliance on the subsequent agreements is alleged or proven by them."

Hogan v. Swaze, 65 Utah 380; 237 P. 1097. 6 R. C. L., p. 915-18, Sec. 298-301.

Unlawful Detainer is Purely a Statutory Proceeding at Law, and Does Not and Cannot Involve the Exercise of Equitable Jurisdiction

The defendants complain and assign as error the trial court's refusal to allow the defendants to show that they had remodeled the building and made improvements at an alleged value of two thousand dollars. These improvements were not called for in the contract between the parties. They were voluntary improvements made for defendants' own purposes which in no way could give them an equity.

Drollinger v. Carson, 155 P. 923.

Neither the alleged improvements nor any alleged equity the defendants might claim was subject to consideration in this action. The only issue in an unlawful detainer is the right of possession. The contract in this case provides that in the event of the forfeiture of the contract for the purchasers' default in the performance thereof they shall become tenants at will; and, in this respect, it is similar to the contract involved in

Forrester v. Cook, 77 Utah 137; 292 P. 206.

In 26 C. J., p. 840, dealing with forcible entry and detainer, it is stated:

“ . . . Since these actions are purely actions at law not involving the exercise of equitable jurisdiction, unless there is special statutory authority therefor, equitable defenses are not available in these actions . . . ”

In Williams v. Nelson, 65 Utah 304; 237 P. 217,

the defendant claimed that although he conveyed the premises in question, he was, nevertheless, the owner thereof, because he executed a deed to the

plaintiff through threats, frauds and duress, and the deed was therefore void. The Court held that such proof was inadmissible to support said defense, and that the defendant's remedy was to institute an action in a court of equity to determine his rights to the premises.

The Court stated :

“Proceedings under the forcible entry and detainer statute are in a class by themselves. Such proceedings can generally be instituted in all inferior courts and courts of special and limited jurisdiction, and are intended to afford a speedy and adequate remedy to obtain the possession of real estate by the landlord against his tenant.”

“ . . . In 16 R. C. L. 1186, Sec. 708, it is clearly pointed out that in unlawful detainer proceedings the tenant can only avail himself of the defenses that the relationship of landlord and tenant does not exist by reason of the invalidity of the lease under which the landlord claims, or that there is no lease or contract to pay rent of any kind, or that no rent is past due. In some jurisdictions, however, if it becomes necessary for the tenant to show that for some adequate equitable reason he should not pay the rent or be ousted from the premises he may enjoin the summary proceeding and bring an action in a court of general jurisdiction to test the equities and hold the summary proceeding in suspense until such action is determined. As a matter of course, in this jurisdiction the tenant may at any time institute an action in a court of equity to determine his rights to

the premises in question. He may, however, not remain in possession of the premises as tenant and nevertheless dispute the title of his landlord. And that is true in any kind of an action." In

Dunbar v. Hansen, 68 Utah 398; 250 P. 982, the Court stated:

"The remedy or procedure available to a defendant in an unlawful detainer action, for the protection and enforcement of any equity or right, he may have in the premises, is pointed out by this Court in Williams v. Nelson, 65 Utah 304; 237 P. 217" In the course of the opinion in that case, it is said:

'In 16 R. C. L. 1186, Sec. 708, it is clearly pointed out that, in unlawful detainer proceedings, the tenant can only avail himself of the defenses that the relationship of landlord and tenant does not exist by reason of the invalidity of the lease under which the landlord claims, or that there is no lease or contract to pay rent of any kind, or that no rent is past due.'

"It is then pointed out that, in some jurisdictions, whenever it becomes necessary for a tenant to show that there is an equitable reason why he should not pay rent or be ousted from the premises, the tenant may enjoin the summary proceeding by an action in a court of general jurisdiction to determine the equities and hold the summary proceeding in suspense until such action is determined."

See also

Forrester v. Cook, 77 Utah 137; 292 P. 206.

If the defendants felt that they had an equity in the premises, their remedy, as pointed out in the foregoing cases, was to file an action in equity to enjoin the unlawful detainer action brought by the plaintiffs, and if they were entitled to any equities, they would have been considered.

The plaintiffs' action was first filed in the City Court on May 23, 1940, and was appealed to the District Court by the defendants, and the case heard on September 13, 1940. There was a period of four months in which the defendants were afforded the opportunity to protect any alleged equities they claimed by invoking the exercise of equitable jurisdiction by a proper action.

In their brief the defendants state that the "only sign of equitable consideration given by the court may be found on pages 28 to 30 of the abstract," wherein the court gave the defendants a week's time to pay the total amount due on the contract, plus attorneys' fees and costs. A reading of the record will definitely show that the defendants themselves made the proposition of paying out the contract, attorneys' fees and costs, if the plaintiffs consented to give them a week's time in order to get the money. After plaintiffs' acceptance of the defendants' offer the court continued the case for one week and held the jury during all of that time to accommodate them. The "equitable consideration" was a proposition of settlement between the parties and not the exercise of any equitable power on the part of the court, as this was a legal action under which the defendants demanded a trial by jury. (Tr. 155-8; 191).

While we believe the Utah cases, cited above, are sufficient authority on the question, we take the liberty of citing to the Court some cases from other jurisdictions illustrating this point. In

36 C. J., page 651, it is stated:

“While it is held under some statutes that a summary proceeding by the landlord to dispossess his tenant cannot be enjoined or stayed by any writ from any court, it is generally held that, in the absence of a statute to the contrary, a court of equity has jurisdiction to enjoin the proceedings. The court will exercise its jurisdiction in a case calling for the exercise of equitable relief, as where the tenant is without an adequate remedy at law, where he has equities which he cannot assert in the summary proceedings”

Phillips v. Port Townsend Lode, etc.,
(Wash.), 36 P. 476.

Yukon Inv. Co. v. Crescent Meat Co.,
(Wash.), 248 P. 377.

Peoples' Mortgage Corp. v. Wilton, (Mich.)
208 N. W. 60.

O'Brien v. O'Brien, 195 Ill. App. 346.

Aegerter v. Hayes (S. D.), 226 N. W. 345.

Dysart v. Enslow, (Okl.), 54 P. 550.

The contract between the parties shows that the defendants' down payment was \$20.00. The evident consideration, as shown by the record, was that the defendants erect and make the permanent improvements to the front and back of the building, as specified in the contract, which improvements the defendants failed to make. Under these circumstances the defendants had no equity justifying an interference by a court of equity. The judgment in this case, giving the plaintiffs possession of the premises, is not inequitable.

Heard v. Gephart, (Kan.), 233 P. 1044.

Dopp v. Richards, 43 Utah 332; 135 P. 98.

The defendants stipulated at the trial that the reasonable rental value of the premises was \$75.00 per month; the monthly payment under the contract was \$30.00 per month. The evidence further shows that the plaintiffs were very lenient with the defendants, and it is inconceivable how the defendants can claim that the plaintiffs dealt harshly with them, when it appears that they deliberately refused to pay the installments, taxes, and insurance when they had on hand \$1200.00 or \$1300.00, received from the Industrial Commission. We will say more on this subject later in this brief.

The Acceptance of the Defendants' Note, (Defendants' Exhibit 2), By the Plaintiffs Did Not Constitute Payment or Discharge the Debt, or Affect the Contractual Rights Between the Parties.

Seemingly, the defendants' chief defense in this suit was based upon the theory that the taxes and insurance premiums had been paid by the defendants by reason of plaintiffs' acceptance of Exhibit 2 in the sum of \$485.82, and, by virtue of such instrument, they were not delinquent in such items. The terms stated on the note itself are a complete answer to the defendants' contention. It specifically states that it is not in payment of delinquent payments due under the terms of the contract and does not in any way alter, modify, or change any of the conditions of said contract. Referring to a part of said defendants' Exhibit 2, among other things, it reads as follows:

“It is expressly understood that it has no connection whatsoever with the contract, wherein we, the undersigned, are purchasing from said payees certain real estate located in Salt Lake City, Utah, and this

note does not in any way alter, modify, or change any of the conditions set forth in said contract, *nor is it in payment of delinquent payments due under the terms of said contract*

(Signed) E. L. GUILD,
(Signed) MABEL GUILD"

In 21 R. C. L., Sec. 70, p. 70, on the subject of payment by note of debtor, it is stated:

"The general rule is that a note given by a debtor for a precedent debt will not be held to extinguish the debt, in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security, or as an acknowledgment or memorandum of the amount ascertained to be due . . . "

In 48 C. J., page 610, it is stated:

"The rule obtaining in most jurisdictions is that, in the absence of agreement or consent to receive it as such, a draft or bill of exchange, although accepted by the drawee, or a promissory note of the debtor, or his acceptance of a draft or bill of exchange drawn upon him, does not in itself constitute payment or amount to a discharge of the debt . . . "

Similar contentions were made by the purchasers of certain real estate in the case of

Malmstrom v. Second East Apartment Co.,
74 Utah 206; 278 P. 811, wherein the Court stated:

"It is claimed that the plaintiff waived whatever rights he had under the for-

feiture provisions of the contract by accepting the note above mentioned for some of the installments and other items, by accepting post-dated checks for some of the payments at the conference had in March or April when the note was given, and by accepting payments throughout the period of Joseph Fargeson's possession after they were due. The defense of waiver was not set up in the pleadings in the case, and we might brush the question aside on that ground. But we prefer to dispose of it on the merits. The evidence upon the point, considered as a whole, does not support the claim. In the first place, as to the note, the Gargesons failed to make the first payment provided for therein. While the acceptance of the note extended the time for payment of the items which it includes, it should not be held to constitute a waiver in case the Fargesons failed to pay the note. A seller does not waive his right to rescind the contract, or, as in this case, to recover possession of the property by granting to the purchaser an extension of time in which to make payment, if the purchaser refuses to pay when the time fixed by the new agreement has elapsed. 29 Cyc. 1393; Machoid v. Farman, 14 Idaho 258, 94 P. 170; Boulder & B. Placer Co. v. Maxwell, et al, 24 Colo. 87, 48 P. 815. . . . The impression made upon the mind of this writer by a reading of the entire record many times is that Malmstrom showed a commendable spirit of forbearance toward the Fargesons all through his dealings with them; but that he nevertheless intended at all times to maintain all his

rights under the contract. It would certainly not be just for us to now say to him that, because he had been lenient toward his debtors, he had thereby lost his right to the possession of his own property to one who failed or refused to make the payments stipulated in the contract.”

In view of the express stipulations on the part of the defendants that the note did not constitute payment and did not in any way affect the contract in any manner, we cannot see any merit in the defendants’ contention that it was payment of the items claimed by them.

In the statement set forth at the outset of our brief, we pointed out that on January 18, 1940, the defendants had been served with notices terminating the contract upon the same grounds that the contract was finally terminated, and we also pointed out that on March 27, 1940, the defendants assigned all their right, title and interest in said contract to their son and daughter, (of which assignment the plaintiffs were not notified).

In the meantime the defendants made small subsequent payments and also made promises that they would pay up all delinquent payments as soon as Mr. Guild received a settlement from the Industrial Commission, which settlement amounted to \$1200.00 or \$1300.00. When this settlement was made with Mr. Guild, and before this suit was filed by the plaintiffs, the defendants tendered to the plaintiffs the sum of \$130.00. Although, at that time, they were in default in the sum of \$160.00, the defendants refused to pay the taxes, and the insurance premiums and urged the plaintiffs to bring suit against them on the note. It is a very apparent fact that the defendants were trying to defeat

the plaintiffs from collecting the items mentioned in the note by taking the stand that the note was payment and, in view of the assignment to their son and daughter, a judgment based on the note would be worthless and uncollectible.

Unfortunately, the plaintiffs had not accepted Exhibit 2 as payment. In spite of this note, there were other grounds (which are set forth in the notices terminating the contract) which were ample for forfeiting the same; that is, the failure to pay the monthly installments and their failure to erect the improvements stipulated in the contract. Partial payments or offers to perform are unavailing.

Cassiday v. Adamson, (Iowa), 224 N. W. 508.

Great Western Inv. Co. v. Anderson, (Wash.), 297 P. 1087.

It would be permissible for the defendants to prove, if they could, that they were not in default in the performance of any of the covenants in the contract which the plaintiffs have alleged they (the defendants) were in default, and that they performed, or tendered performance, before the forfeiture of the contract.

Great Western Inv. Co. v. Anderson, (Wash.), 297 P. 1087.

Dineen v. Olson, (Kan.), 85 P. 538.

Haile v. Smith, (Cal.), 45 P. 872.

Schubert v. Lowe, (Cal.), 223 P. 550.

The evidence is undisputed that the defendants were in default in all of the items stated in the notices of forfeiture.

There are several assignments of error that this Court should not consider. The assignments numbered 7, 8, and 10 are, according to numerous de-

cisions of the court, too general and indefinite; besides assignments of error, such as the assignments here numbered 7 and 10, merely attack the judgment. The assignment of error numbered 9 should not be considered, for the reason that the objection thereby urged was not presented to or passed upon by the trial court, by pleading, as it might have been (*White v. Century Gold Min. & Mill. Co.*, 28 Utah 311, 78 P. 868; *Busby v. Century Gold Min. Co.*, 27 Utah 231, 75 P. 725), nor was the question of the reasonableness or sufficiency of the notice of forfeiture, as to time, form, or otherwise, an issue litigated on the trial. These are questions that cannot be made for the first time on appeal.

Salt Lake Inv. Co. v. Fox, 37 Utah 334; 108 P. 1132.

Summit County v. Gustaveson, 18 Utah 351; 54 P. 977.

We do not find that appellants have discussed the 7th or 10th assignments in their brief.

As to the subject of the 8th assignment of error, viz., that "the court erred in refusing to consider the equitable issues presented by the pleadings," the appellants, in describing the contents of their answer, say, that they admit that they agreed to make certain improvements, and the plaintiffs had, after execution of the contract, considered the improvements specified in the contract to be undesirable, *and had waived the provisions of the contract with respect thereto*; and they say, that the defendants had made improvements on the property to the approximate cost and value of \$2,000. The appellants further say: "The evidence was in conflict as to the waiver of the contract requirements regarding the building of the front porch and stuccoing of the rear. The defendants offered proof to the effect that they had, since the execu

tion of the contract, improved the property to the extent of \$2,000." And, finally, they say, "The pleadings disclose issues upon the following questions: . . . (6) Whether in equity the court should declare a forfeiture of a contract for the purchase of a house and lot upon which more than one-third of the principal amount has been paid and where \$2,000 in valuable improvements have been placed on the property."

Disregarding the rule which prevails in this and a majority of the States, that equitable defenses are not admissible in actions of unlawful detainer, and assuming that the defendants have some equity, the latter does not exist by reason of the so-called improvements made by them. Even in California, where the courts recognize equitable defenses in actions for the recovery of possession of real property, it has been held that the making of such improvements is no defense, and in

Haile v. Smith, 128 Cal. 415; 60 P. 1032, an action of ejectment by a vendor against a defaulting vendee, the Court said:

"He (defendant) received possession of the land from respondent under the contract, and can retain possession only by fulfilling his covenants which he therein made. He cannot keep both the land and the purchase money. It is not necessary, therefore, for the purposes of this case, to determine definitely whether or not respondent had a good and sufficient title. If appellant desired to retain the possession which he acquired under the contract, he should have complied with his part of it. Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another

matter. *It constitutes no defense to the present action.*" In

Drollinger v. Carson, 97 Kan. 502; 155 P. 923, heretofore cited, the Court said:

"The only basis for a claim that the judgment is inequitable on the facts is a showing that the defendants had expended \$900 in the improvement of the property. Much of this expenditure — perhaps \$200 — was for items of ordinary repairs and maintenance, such as papering and painting, which served the purpose of the occupants as much as that of the owner. Some of it — possibly a greater amount — was for changes which would not necessarily add to the value of the real estate, at least in proportion to their cost, and which may not have been desired by the plaintiff."

And further:

One who occupies land under a contract, providing that he shall have the title upon completing the purchase price, but must give up the property if he makes default, has no absolute right with respect to improvements he may make. His agreement gives him none, and the occupying claimant's act . . . does not apply, for he is not within its letter or spirit. 16 A. & E. Encycl. of L. 96. The ordinary rule is that he is allowed no compensation for his betterments, although there are cases to the contrary. 16 A. & E. Encycl. of L. 97; 39 Cyc. 1401. Whatever concession is made to him in this regard must result from circumstances rendering it inequitable that he should lose his entire investment — a matter to be determined upon the facts of each

particular case. The trial court evidently concluded that, inasmuch as the defendants had had the use of the property during the period of more than five years that the contract had been in force, equity did not require any allowance to them on account of what they had invested in permanent improvements.

In Kansas, as in California, equitable defenses are admissible in unlawful detainer actions. In both States, it is settled that justices of the peace are without equitable jurisdiction or power, and an action of forcible detainer must be determined as an action at law.

Dineen v. Olson, 73 Kan. 379; 85 P. 538.

Linder v. Warnock, 91 Kan. 272; 137 P. 962; Ann. Cas. 1915C 314.

Richmond v. Superior Court, 9 Cal. App. 62; 98 P. 57.

Schubert v. Lowe, 193 Cal. 291; 223 P. 550.

In the Dineen case, it was held that "for the purpose of determining the right of possession, questions of title, legal or equitable, may be incidentally considered;" but that, "if, outside of the question of possession, he has rights concerning crops, improvements, or of any other nature, they can be adjusted in any appropriate proceeding without embarrassment on account of this judgment, as it is not a bar to any after action brought by either party." However, the general rule in both States is, that if title, either legal or equitable, is involved, as in suits between vendor and vendee, growing out of a contract of sale, they must be tried in a court of general jurisdiction.

Linder v. Warnock, *supra*.

Richmond v. Superior Court, *supra*.

In an unlawful detainer action the only issue is the right of possession (*Williams v. Nelson*, 65 Utah 304, 237 P. 217; *Richardson v. King*, 51 Idaho 736, 10 P. (2d) 323; *Aegerter v. Hayes*, 55 S. D. 337, 226 N. W. 345; *William Weisman Holding Co. v. Miller*, 152 Minn. 320, 188 N. W. 732) and if other issues are injected into an action for the possession of real property, which at first was one of unlawful detainer, it becomes an action in ejectment or to quiet title.

Henderson v. Miglietta, 206 Cal. 125; 273 P. 581.

Thompson v. Reynolds, 53 Utah 437; 174 P. 164.

And so, as was held in

Dunbar v. Hansen, 68 Utah 398; 250 P. 982,

if there is any equitable reason why the tenant should not be ousted, he must institute an action in a court of general jurisdiction to determine the equities; and, if he does, the Court can determine such questions as were determined in

Croft v. Jensen, 86 Utah 13; 40 P. (2d) 198.

But, in such a plenary action by the defendants here, we do not believe the question of their improvements of the property involved would be of consequence, especially in view of contract provision that in case of their default, any improvements made by them shall be forfeited to the vendor.

27 R. C. L., Sec. 428.

66 C. J. 1050.

Pillow v. McLean, (Tex. Civ. App.), 91 S. W. (2d) 898.

Chowchilla Col. Co. v. Thompson, 39 Cal. App. 517; 179 P. 411. In

Herpel v. Herpel, 162 Mich. 606; 127 N. W.
763,

the Court held, that where complainant sold land to defendant on monthly payments for the life of the complainant, and reserved a life estate, permanent improvements made by defendant of his own accord will be presumed to have been made for his own benefit, and so not to entitle him to credit therefor on such payments. And see

Cent. Dig. Vendor and Purchaser, Sec. 413.

Dec. Dig. Vendor and Purchaser, Sec. 201.

And when the question of such improvements is properly in issue, the inquiry relates to the extent to which the value of the property has been enhanced by the improvements, not the cost to the purchaser.

Tyler v. Burgeson, 229 Mich. 268; 201
N. W. 185.

Collins v. Creason, 55 Or. 524; 106 P. 445.

66 C. J. 796, Secs. 412-419.

27 R. C. L. 665, Par. 428.

While the defendants allege that the provision of the contract as to building and remodeling porches was "waived," no facts showing such waiver are alleged, and they ignore the rule that such provisions are not the subject of waiver. If the making of such improvements were dispensed with, it must have been by an agreement modifying the contract in that respect; and, as we have shown, such agreement must have been in writing and upon a sufficient consideration. The reason is, as stated in

McKenzie v. Harrison, 120 N. Y. 260; 24
N. E. 458.

8 L. R. A. 257; 17 Am. St. Rep. 638,

"that it is not safe or prudent to permit
the (written) contract to be modified or

changed by the testimony of witnesses as to the parol statements or agreements of parties.”

The distinction is between the contract itself and subsequent performance,

Scheerschmidt v. Smith, 74 Minn. 224; 77
N. W. 34,

The appellant, Edward L. Guild, by his own testimony conclusively proves the default as to the improvements. In reciting the conversation upon which appellants rely as a waiver of this provision, this appellant said:

“We told them what we intended to do was to make a small porch at the entrance but not complete the porch as we had agreed on in the first place. We did not do anything with the porch.” (Ab. 16-17; Tr. 116).

So if we assume the claim of appellants as to a modification the testimony is conclusive that the modification, as proposed by appellants, was not complied with and the default as to this was complete.

CONCLUSION

In this case appellants went into the possession of the property of respondents, and had a right to remain in possession only so long as they complied with the provisions of the contract under which they obtained possession.

The sole question is whether they were in default.

Brandley v. Lewis, 92 P (2d) 338.

The complaint sets forth a straight unlawful detainer action. The answer, when shaken down to

the admissible elements of defense in this character of action, sets up two alleged defenses:

1. That the default in the agreement to make improvements was waived.
2. That there was no default of payments on the contract or of taxes or of insurance premiums because a note was given.

It will be noticed that the right of re-possession in case of any of these four defaults is absolute in this agreement. The existence of all four defaults is established here beyond controversy and in such a way that the jury could not have found otherwise, and if so found, the court would have been called upon to set aside the verdict.

The default as to improvements is admitted as above shown. The default of payment upon the agreement was so clear as to involve no question for the jury.

Appellants relied upon a tender of \$130.00, but admit that the default would have been in excess of this except for the note of \$485.82. Now in addition to the fact that the note itself recites that it is not

“in payment of delinquent payments due under the terms of said contract”

and, of course, no court or jury would be permitted to find contrary to this expressed intention, appellants make the contention that the pen notations on the note are part of the note, but the pen notations themselves show that no part of this \$485.82 was in any way related to the installment payments on this contract. The pen notations further show included in this sum was \$130.00 for lumber admittedly procured by respondents for appellants, and when this \$130.00 is deducted from the face of this note the \$130.00 tender claimed was obviously insufficient. This is clear beyond dispute and is

decisive of this default, assuming everything that appellants claim with relation to this note.

Now as to the third default, that is on taxes, it is admitted the taxes were not paid otherwise than by giving the note, but the parties agreed that the note was not a payment.

The note itself was never paid, nor was the portion of the note relating to taxes paid, and the authorities hereinabove recited are conclusive that even under appellants' own contention, this default therefore remains.

What we have just said with relation to taxes applies also to the default as to insurance.

So that appellants, by their own agreements and their own defaults, terminated their right to remain in possession of this property.

The assignments as to admission of testimony becomes totally immaterial because the interior improvements are nowhere involved in this case either by pleading or otherwise, and are excluded by the nature of the action.

The other question as to an offer on accruing installments was of no materiality because the only offer pleaded was the \$130.00 hereinabove referred to. The question itself called for a conclusion.

Appellants could not have been prejudiced by the striking of testimony as to modification, because their own testimony showed the default in that respect.

The contention as to the court imposing attorneys' fees is totally immaterial. In the first place appellants agreed to this suggestion by the court, (Tr. 191) and in the second place no attorneys' fees are imposed in the judgment appealed from.

The contention that there was a question of fact as to whether payments on this contract applied to the

current month or to the back payments is not well taken. Appellants themselves introduced Exhibit I showing not only the application of these payments upon their contract, but also showing their default as to taxes and interest.

Payments, in the absence of an agreement, are presumed to be applied just as they were applied in this exhibit. There was no evidence to the contrary, and as stated, the default as to these payments was conclusive according to appellants' own testimony.

There was no question of fact as to whether the note was given in payment of installments as contended by appellants, because the note on its face and including the notations, which it is claimed by appellants should be included, show conclusively that it was not to be applied, nor was any element of installment payments involved in it.

There was no question of intention on this note which could have been submitted to the jury, or on which any contrary findings could be sustained. The construction of these written documents was for the court.

The other question which appellants suggest should have been submitted to the jury was the default in making the improvements, and as already shown, this default was admitted.

The written exhibits in this case, controlling upon the parties here, are conclusive of the rights of the parties. There could have been no other determination in this case involving the sole question of right of possession, and the other incidental question of damages not argued by appellants.

We respectfully submit that the judgment should be affirmed.

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